While the relationships are terminable at will, they have continued for many years, and there is no reason to anticipate their early voluntary termination. In the opinion of the examiner these relationships constitute agreements, understandings or arrangements which fall within the cognizance of the antitrust laws, for the reasons hereafter indicated.

6. It is asserted by respondent Luria (whose position is echoed by a number of respondent mills) that "[i]n every case in which relations between buyers and sellers have been held to violate Section 3 of the Clayton Act and Sections 1 and 2 of the Sherman Act, there have been agreements between the sellers and the buyers which *bound* the buyers not to buy from competitors of the sellers" (p. 533 Luria Proposed Findings). While it is true that in a number of the cases cited there were binding legal agreements involved, this feature was not present in all of these cases nor in others which have been decided. Thus, in *Harley-Davidson*, 50 F.T.C. 1047, and *Outboard Marine Mfg. Co.*, 52 F.T.C. 1553, cited by respondents, there was no legal agreement binding the dealers to purchase exclusively from the respondent, although the latter did in practice seek to pressure dealers into following such a policy. In the *Outboard Marine* case the respondent contended that its "single dealing" policy was "a unilateral policy of customer selection, without agreement, understanding or condition of sale" and was permissible under the *Colgate* case. To this argument the examiner, whose decision was affirmed by the Commission, stated (at 1564) that: "The words [in Section 3] 'condition, agreement or understanding' were designedly employed by Congress to prevent evasions on technical arguments as to whether *informal understandings rose to the dignity of formalized written commitments*" (emphasis supplied). More recently, the Commission in *The Timken Roller Bearing Co.*, Docket 6504, [58 F.T.C. 98, 103] January 24, 1961, stated that "express written agreements are not needed to prove exclusive dealing".

7. A number of the respondents seek support for their position, regarding the necessity for proving the existence of a binding legal agreement, in the observation made by Justice Frankfurter in the *Standard Stations* case (337 U.S. at 313–14), to the effect that if it was in fact as economically desirable as the defendant contended for gasoline service stations to confine their purchases to a single supplier, they would continue to do so "though not bound by contract". The examiner does not interpret this dicta in the *Standard Stations* case as tantamount to a holding that, absent a binding legal obligation to deal exclusively, there can be no violation of Section 3 of the Clayton Act.

Holdings in other antitrust cases make it abundantly clear that this is not the law.

8. Section 3 of the Clayton Act and Sections 1 and 2 of the Sherman Act are in pari materia, insofar as they involve the concept of agreement, contract, understanding, combination or conspiracy. Section 3 of the Clayton Act involves sales or contracts to sell "on the condition, agreement, or understanding" that the purchaser will not deal in competing goods. Section 1 of the Sherman Act prohibits "[e]very contract, combination * * *, or conspiracy in restraint of trade", while Section 2 thereof prohibits, among other things, combinations or conspiracies to monopolize trade. Section 3 of the Clayton Act involves the specific prohibition of a type of practice which has also been held to be actionable under the more generally phrased prohibitions of the Sherman Act on contracts, combinations or conspiracies in restraint of trade or to monopolize trade. Thus in *Times-Picayune Publishing Co.* v. *U.S.*, 345 U.S. 594; and *Northern Pac. R. Co.* v. *U.S.*, 356 U.S. 1, tying arrangements were challenged as contracts, combinations or conspiracies in restraint of trade in violation of Section 1 of the Sherman Act, while in *International Salt Co.* v. *U.S.*, 332 U.S. 392, and in the *Standard Stations* case (*Standard Oil Co. of California* v. *U.S.*, 337 U.S. 293) tying and exclusive dealing arrangements were challenged as violations of both Section 3 of the Clayton Act and Section 1 of the Sherman Act. While the Sherman Act has been held to be "the more stringent law", insofar as the degree of proof of competitive impact is concerned (*Times-Picayune Pub. Co.* v. *U.S.* at 610), there is no significant difference between it and Section 3 of the Clayton Act with respect to the nature of the agreement or combination which must be established.

9. As noted in paragraph 6 above, respondents appear to recognize that the terms "condition, agreement or understanding" as used in the Clayton Act, and "contract, combination * * *, or conspiracy" as used in the Sherman Act, are substantially synonymous. However, their position is that in both instances the terms connote binding legal agreements. This position is contrary to the weight of authority. As recently stated by one with long experience in the field of antitrust law:[115]

An agreement, in antitrust parlance *is not the same as an agreement in the law of private contracts.* A conspiracy or combination—an *agreement,* if you will—is present *where there is joint action.* [Emphasis supplied.]

10. The above-quoted comment was occasioned by an analysis of the Supreme Court's recent decision in *U.S.* v. *Parke, Davis and Co.*,

[115] Handler, *Annual Review of Antitrust Developments,* THE RECORD of the Association of the Bar of the city of New York, Vol. 15, No. 7 Oct. 1960, p. 370.

362 U.S. 29. The holding in the *Parke, Davis* case is not only contrary to respondents' position concerning the necessity for proving the existence of a binding legal agreement in restraint of trade, but also sets at rest its complementary argument that absent such an agreement a businessman has the untrammeled right to trade or not to trade with whom he chooses. In that case the defendant was charged with combining with retail and wholesale druggists to maintain the prices of its products. The District Court held that a violation of the Sherman Act had not been established because "the actions of [Parke, Davis] were properly unilateral and sanctioned by law under the doctrine laid down in *U.S.* v. *Colgate & Co.*, 250 U.S. 300", 164 F. Supp., at 829. The District Court, in holding that Parke, Davis' actions were "unilateral", had apparently misinterpreted the Supreme Court's ruling in the *Colgate* case that there could be no Sherman Act violation without a charge of "unlawful agreement", as meaning that there had to be an actual, express agreement, written or oral. The Supreme Court in *Parke, Davis* held, in substance, that agreements or combinations which violate the Sherman Act are not limited to "contractual arrangements, express or implied" (at 41).

11. The language just quoted is based upon the Court's earlier decision in *FTC* v. *Beech-Nut Packing Co.*, 257 U.S. 441, [1 S. & D. 170] which the Court cited in *Parke, Davis* as indicating that its decision in *Colgate* had been misconstrued. The *Beech-Nut* case likewise involved a charge of illegal resale price maintenance, except that the practice was challenged as an unfair method of competition under the Federal Trade Commission Act, rather than as a combination in restraint of trade under Section 1 of the Sherman Act. The parties had stipulated that there was no contract between the company and its distributors whereby prices were maintained. The dissenting opinion by Mr. Justice McReynolds, relying on the *Colgate* case, held that there could be no finding of an illegal agreement "when the existence of the essential contracts is definitely excluded" by stipulation. The majority opinion in *Beech-Nut*, as interpreted in the *Parke, Davis* case (at 41),

> * * * did not read *Colgate* as requiring such contracts; rather, the Court dispelled the confusion over whether a combination effected by contractual arrangements, express or implied, was necessary to a finding of Sherman Act violation * * *.

Also cited in *Parke, Davis*, was the Court's decision in *U.S.* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, which involved a charge of resale price maintenance in violation of the Sherman Act. The Court in *Bausch & Lomb*, citing its earlier holding in *Beech-Nut* that there

could be a combination in restraint of trade "without agreements", held that the company's combination with distributors and wholesalers was illegal, stating (at 723):

Whether this conspiracy and combination was achieved *by agreement or by acquiescence* of the wholesalers coupled with assistance in effectuating its purpose is immaterial. * * * In other words, *an unlawful combination is not just such as arises from* a price maintenance *agreement, express or implied* * * *. [Emphasis supplied.]

12. Based on its analysis of its earlier holdings in *Beech-Nut* and *Bausch & Lomb* the Court, in *Parke, Davis*, concluded (at 44):

The *Bausch & Lomb* and *Beech-Nut* decisions cannot be read as merely limited to *particular fact complexes justifying the inference of an agreement* in violation of the Sherman Act. Both cases teach that judicial inquiry is not to stop with a search of the record for evidence of *purely contractual arrangements.* * * * [W]hether an unlawful combination of conspiracy is proved is to be judged by *what the parties actually did rather than by the words they used.* [Emphasis supplied.]

13. It is true that *Parke, Davis* and the other cases discussed therein involved resale price maintenance arrangements. However, there is no reason why the logic of these decisions should not apply to exclusive dealing or tying arrangements, which are also cognizable under Section 1 of the Sherman as well as under Section 3 of the Clayton Act. Any doubt on this score was recently set at rest in *Osborn* v. *Sinclair Refining Co.*, CA 4, July 11, 1960, involving a charge that the defendant had required its dealers to purchase all of their requirements of tied-in tires, batteries and accessories from a source designated by it, in violation of Section 1 of the Sherman Act. The court, by Chief Judge Sobeloff, addressing itself to the question of whether there is a distinction between price fixing and tie-ins, insofar as the necessity for establishing that they are based on express agreement, observed that "it is no distinction to say that *Parke, Davis* was concerned with price fixing whereas here we have a tie-in."

Reversing the district court's dismissal of the complaint, based on the fact that the dealers were not required by express contractual provision to purchase their accessory requirements from defendant's designee, the circuit court, citing the Supreme Court's holding in *Parke, Davis* that "an unlawful combination is not just such as arises from a price maintenance agreement, express or implied", stated:

Although, standing alone, the above general findings do not, perhaps, disclose a tie-in accomplished by express agreement with dealers, *such an express contract is not necessary.* [Emphasis supplied.]

14. It seems clear, therefore, that in order to establish that Luria's sale of scrap to the mills was made "on the condition, agreement, or understanding" that the mills would purchase scrap from it exclu-

sively, within the meaning of the Clayton Act, or that the arrangements between Luria and the mills each constitute a "contract, combination * * * or conspiracy" within the meaning of the Sherman Act, it is not necessary to establish the existence of any binding contractual arrangement, express or implied, between them. It is also clear that the "essential agreement, combination or conspiracy may be implied from a course of dealings or other circumstances", as stated in *Frey & Son, Inc.* v. *Cudahy*, 256 U.S. 208, 210 (reversing the court of appeals' dismissal, which was based on the ground that "there was no formal written or oral agreement") or, as the Court expressed it in *Parke, Davis*, the agreement or combination may be proved "by what the parties actually did rather than by the words they used". See also *Osborn* v. *Sinclair*, *supra*, holding that a tying arrangement "may be inferred from a course of conduct".

Viewing the course of conduct and course of dealings between Luria and each of the mills, which have been heretofore discussed in detail, there is no question as to the existence of an agreement, understanding, or combination between each of the respondent mills and Luria pursuant to which each of the mills uses Luria as its substantially exclusive broker, and whereby a number of the mills buy from Luria substantially all of their scrap and the others buy from it substantially all of the scrap which they purchase on a brokerage basis.

15. In the foregoing discussion the question of the legality of the activities of Luria and the mills has been considered in the frame of reference of an agreement or combination, and as to the necessity for such agreement or combination to be of an express, binding nature. However, it may be noted that the conduct of the parties may also be subject to attack on grounds separate and apart from any agreement or other purposeful joint action. In the *Colgate* case itself the Court's pronouncement of the right of a trader "freely to exercise his own independent discretion as to the parties with whom he will deal" was subject to the qualification that this right existed: "In the absence of any purpose to create or maintain a monopoly" (at 307). This limitation on the right of a trader to choose the persons with whom he will deal was applied by the Court in *Lorain Journal Co.* v. *U.S.*, 342 U.S. 143, in which a newspaper publisher claimed the right to select its customers and to refuse to accept advertisements from whomever it pleased. The Court held that this "general right" was not "an unqualified one", and that (at 155):

The right claimed by the publisher is neither absolute nor exempt from regulation. Its exercise as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act.

16. It is thus clear that the practices of Luria and the mills, insofar as they involve exclusive dealing, may also be subject to attack as attempts to monopolize within the purview of Section 2 of the Sherman Act, separate and apart from any agreement between them to deal exclusively. It may be noted, in this connection, that while the qualification on the right of a trader to deal freely appears to involve a subjective element, viz, an "intent" or "purpose" to create a monopoly, it has been generally accepted that: "The requisite intent * * * is not a 'specific' intent to monopolize, but rather a conclusion based on how the monopoly power was acquired, maintained or used". *Report of Attorney General's Committee to Study Antitrust Laws*, March 31, 1955, at 55. The courts have often inferred that a monopoly position has been "deliberately" maintained as a matter of "objective" rather than "subjective" intent, "relying on business practice to support the conclusion that men intend the natural consequences of their acts". *Id* at 56.

Line of Commerce

17. Before considering the legal questions raised concerning the nature of the competitive impact or restraint of trade which must be shown, it is well to discuss the preliminary question as to the line of commerce involved. As has been heretofore noted, respondents (particularly respondent Luria) contend that the line of commerce against which to weigh or consider the competitive impact or restraint of the arrangements between Luria and the mills should include pig iron as well as scrap, and that minimally it should include all scrap purchased by the mills, rather than merely that purchased from broker-dealer sources.

18. Respondents' position that pig iron as well as scrap should be included in the line of commerce is, of course, based on the "reasonable interchangeability" test established by the *Cellophane* case (*U.S.* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377). However, it is now generally accepted that this test is limited to cases arising under the monopolization clause of Section 2 of the Sherman Act and does not apply to cases involving a charge of incipient, rather than actual, restraint or monopoly, such as those arising under Sections 3 and 7 of the Clayton Act, where the test applied is whether the product has "sufficient peculiar characteristics and uses to constitute [it] sufficiently distinct from all other [products] to make [it] a 'line of commerce' * * *". *U.S.* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593; *U.S.* v. *Brown Shoe Co.*, 179 F. Supp. 721; *U.S.* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576; *Brillo Mfg. Co.*, 54 F.T.C. 1905; *Mytinger & Casselberry, Inc.*, Doc. 6962 [57 F.T.C. 717], September 28, 1960. It is open to question whether the rule in the *Cellophane* case applies even

in Section 2 Sherman Act cases, where the charge is an attempt to monopolize rather than actual monopolization. See *Cellophane* decision, footnote 23, at p. 395.

19. As has been heretofore found, scrap has sufficient peculiar characteristics and uses to constitute it a distinct product from pig iron for purposes of determining the appropriate line of commerce in this proceeding. See *Tampa Electric Co.* v. *Nashville Coal Co.*, 276 F. 2d 766 (CA6, 1960), reversed on other grounds, U.S. Sup. Ct., February 27, 1961, holding that coal and fuel oil were separate lines of commerce for purposes of Section 3 of the Clayton Act (29 LW 4237). In any event, even applying the reasonable interchangeability test of the *Cellophane* case, the evidence establishes that there are such significant limitations on the interchangeability of the two products, to constitute each a separate line of commerce.

20. The next question presented is whether scrap sold by all producers and vendors thereof should be considered the relevant line of commerce, as contended by respondent, or whether it should be limited to sales by brokers and dealers only, as contended by counsel supporting the complaint. It is suggested by respondents that it is improper to further subdivide a product or commodity market on the basis of the channels of distribution. This is precisely the position taken by the hearing examiner in *Mytinger & Casselberry, Inc.*, *supra*, in which he overruled the contention that vitamin preparations sold by the house-to-house method constituted the line of commerce, and held that the line of commerce was determined by the product and not the method of distribution or sale. However, the Commission reversed, stating that "each of the foregoing commercial areas can be properly deemed a separate market or line of commerce within the meaning of Section 3". In *International Boxing Club of N.Y., Inc.* v. *U.S.*, 358 U.S. 242, involving a charge of violation of both Sections 1 and 2 of the Sherman Act, it was contended that the relevant market should be considered to be the entire field of professional boxing, rather than merely a segment thereof, viz, championship boxing contests. While purporting to apply the more rigorous reasonable interchangeability test, the Court nevertheless held championship boxing contests to be an appropriate line of commerce, based on the finding of the lower court that there existed "a separate, identifiable market" for championship boxing contests.

21. As has already been heretofore found, approximately 90% of all scrap sold to consumers moves through brokers and dealers. While direct sources, such as industrial fabricators and railroads, sell some scrap directly to consumers, scrap is merely a by-product of their business. The supply and price of scrap are influenced largely by broker-

dealer transactions. Under all the circumstances, it is the conclusion and finding of the examiner that the broker-dealer scrap market constitutes the relevant market or line of commerce for purposes of this proceeding. However, as has been already noted, in view of the fact that the vast preponderance of scrap moves to the consumer through brokers and dealers, it makes little real difference in most cases whether Luria's market share is measured solely by the broker-dealer market or by total scrap sales.

Competitive Impact

22. Luria's position, in essence, is that while it is the largest broker in the industry, it does not dominate the industry or have a monopoly therein, and that there is accordingly no basis for any inference that its arrangements with the various respondent mills will unduly restrain competition. It cites, in this connection, the decision of the hearing examiner in the *Scott Paper Company* case, Docket 6559 [57 F.T.C. 1415], that there is "a vast difference between leadership and dominance", and that dominance cannot exist without control over "raw materials, production, price, channels of distribution, or entry of new competitors". Also cited are the classic holdings that monopoly power means the power to exclude competitors or control prices (*American Tobacco Co.* v. *U.S.*, 328 U.S. 781, 811), and that it "involves something more than extraordinary commercial success", but involves "something like the use of means which made it impossible for other persons to engage in fair competition" (*U.S.* v. *du Pont*, 351 U.S. 377).

23. Factually, Luria's argument is not supported by the record since, as has already been found, it does possess monopoly power and is dominant in a number of markets. Likewise, its power has involved more than extraordinary commercial success, having been gained to a considerable extent through the anticompetitive arrangements with the mills. Aside from this, however, Luria's legal argument is largely irrelevant since this proceeding does not involve a charge of monopolization under Section 2 of the Sherman Act where proof of monopoly power is necessary. The holding of the examiner in the *Scott Paper* case as to the necessity of showing power to fix prices and exclude competitors and the other indicia of market control has since been reversed by the Commission with the comment that "[s]uch power and control would amount to monopoly condemned by the Sherman Act", and need not be shown in a Section 7 Clayton Act case.

It may be noted that even in cases brought under Section 2 of the Sherman Act, where the charge involves an attempt, combination or conspiracy to monopolize, rather than actual monopolization, no "showing [is] required that the desired end of monopoly power was

attained". *Report of Attorney General to Study Antitrust Laws*, at 61. See also *Lorain Journal* v. *U.S.*, 342 U.S. 143, 153, holding that "it was not necessary to show that success rewarded appellants' attempt to monopolize", and citing with approval the holding in *Swift & Co.*, v. *U.S.*, 196 U.S. 375, 396 that:

[W]hen that intent [to monopolize] and the consequent dangerous probability exist, this statute [the Sherman Act], like many others and like the common law in some cases, *directs itself against that dangerous probability* as well as against the completed result. [Emphasis supplied.]

24. To the extent that the complaint herein is based on the exclusive arrangements between Luria and each of the mills, it is unnecessary to establish that they did in fact create a monopoly in Luria. It is well settled that in exclusive dealing and tying cases proof of a reasonable probability of substantial competitive injury in the relevant market or line of commerce involved is sufficient to establish the illegality of such arrangements, without proof of actual competitive injury or of resultant monopoly. In *Standard Stations* and subsequent decisions of the "reasonable probability" test was held to be satisfied by proof that an exclusive arrangement will result in the foreclosure of competition in a substantial share of the relevant market, even though the supplier does not enjoy a dominant position in the market. See, e.g., *Dictograph Products Inc.* v. *FTC*, 217 F. 2d 821, *cert. denied*, 349 U.S. 940 [5 S.&D. 707]; and *Tampa Electric Co.* v. *Nashville Coal Co.*, U.S. Sup. Ct., February 27, 1961. While the Supreme Court in *Tampa Electric* reversed the lower court, it did so because the *Standard Stations* test had been applied to too restricted a market area, and not because of any disagreement with the test itself. In fact it reemphasized the validity of the test, stating that "an exclusive dealing arrangement * * * does not violate the section [Section 3] unless the court believes it probable that performance of the contract will foreclose competition *in a substantial share of the line of commerce affected*", and that "the competition foreclosed by the contract must be found to constitute *a substantial share of the relevant market.*" [Emphasis supplied.]

25. Respondent Bucyrus Erie argues that since the complaint here is brought under Section 5 of the Federal Trade Commission Act, rather than Section 3 of the Clayton Act, "the slide rule approach of Standard Stations and Dictograph Products is not applicable". Respondent's suggestion that additional proof is required in proceedings not brought under Section 3 of the Clayton Act, apparently is based on the holding of the Court in the *Times-Picayune* case that the standard of proof of competitive impact of a tying arrangement is more rigorous under Section 1 of the Sherman Act (which the Court characterized as "the more stringent law") than under Section 3 of the

Clayton Act. It may be questioned whether the difference in proof under the two statutes is as great as suggested in view of the Court's later holding in the *Northern Pacific* case (356 U.S. at 6), that a tying arrangement may be illegal under Section 1 of the Sherman Act where the seller had "sufficient economic power to impose an appreciable restraint on free competition in the tied product", without a showing of dominance or monopoly power.

26. In any event, whatever may be the difference between the degree of proof of competitive impact required in a Section 1 Sherman Act case and that in a Section 3 Clayton Act case, the examiner is satisfied that no such difference exists between the latter and a Section 5 Federal Trade Commission Act proceeding involving an exclusive dealing charge. As has already been noted, the Federal Trade Commission Act has been held to reach not only violations of the Sherman and Clayton Acts, but also incipient violations thereof. Accordingly, it can hardly be equated with the Sherman Act, insofar as the degree of proof of competitive impact which is required. It has even been suggested that the Federal Trade Commission Act may require a lesser showing of competitive impact than under the Clayton Act. This view has been challenged by those who point out that since "the Clayton Act itself embodies an incipiency test of violation * * * the incipiency doctrine is compounded if Section 5 is used to stop in its incipiency violatons of incipient Clayton Act". Oppenheim, *Antitrust Highlights*, at 21 (Reprinted from Vol. 17, *ABA Antitrust Section Reports*, pp. 215–259).

27. Whatever may be the correctness of the view that the test of violation under the Federal Trade Commission Act is more lenient, the examiner is satisfied that it is certainly no stricter, than that in a proceeding brought under Section 3 of the Clayton Act. The shares of the various relevant markets from which competitors have been foreclosed here, are so staggering in most instances, that there can be no question the test of establishing a probable substantial lessening of competition as a result of the exclusive arrangements has been met. Furthermore, to the extent that proof beyond the mere fact that a substantial portion of the relevant market has been tied up by the exclusive arrangements is required, there is adequate evidence in the record from which a finding of the probable adverse competitive impact of these arrangements can be made.

Liability of the Mills

28. Several of the respondent mills, particularly Bethlehem, CF&I and U.S. Steel, argue that whatever liability may attach to Luria under its arrangements with the mills, the mills themselves cannot be held to be liable since Section 3 is directed against the seller or lessor in an

exclusive dealing arrangement, and not the buyer or lessee. U.S. Steel points out that in *FTC* v. *Motion Picture Advertising Service Co. Inc.*, involving a proceeding brought under Section 5 of the Federal Trade Commission Act based on exclusive contracts for the supplying of advertising films to theatres, the theatre owners were not joined as respondents and only the supplier of the films was held liable.

29. In opposition to the contention of the respondent mills, counsel supporting the complaint cite the holding in *Anchor Serum Co.* v. *FTC*, 217 F. 2d 867, 870 [5 S. & D. 718, 723] that "there is nothing in the language of the Act [Section 3] from which it can be inferred that two classes of contracts were contemplated, depending on whether the contract was initiated by the seller or the buyer." The court indicated that it was "immaterial whether the contract was for the benefit of the seller or the buyer" since "the determining factor is whether the contract had the proscribed effect." The *Anchor Serum* case does not directly dispose of the point raised by respondents since it does not decide whether the buyers may be held liable, but merely that the seller cannot escape liability on the ground that the buyers were the initiators of, and presumably stood to benefit from, the exclusive contracts. The case is significant, however, insofar as it indicates that the legality of an exclusive contract is determined by the nature of the restraint which it imposes on competition, and not on basis of whether it was initiated by the seller or the buyer.

30. This same principle was applied in *Tampa Electric Co.* v. *Nashville Coal Co.*, 276 F. 2d 766 (CA6, 1960), involving an exclusive contract for the sale of coal to a single buyer. The seller had contended that "the statutory history of Section 3 shows that the Act was not intended to apply to consumers * * *. In other words, [that] Congress was concerned only with attempts by sellers, who were economically powerful, to restrain competition in the distributive process" (at 770). To this the court responded: "The statutory language is not so restrictive." It pointed out that the statute "condemns certain transactions" which have the proscribed effect on competition, and concluded that: "A single contract of sale of sufficient magnitude, with performance extending over an extended period of time, can cause this result", even "where the seller did not occupy a dominant economic position in the industry."

Tampa Electric involved a declaratory judgment action by the buyer against the seller to have its contract with the seller declared valid and enforceable, after the seller had refused to perform under the contract for the alleged reason that it was illegal under Section 3 of the Clayton Act and Sections 1 and 2 of the Sherman Act. The court held that the contract "was in violation of Section 3 of the Clayton Act [and] was therefore illegal and unenforceable" (at 768). While this is not a

direct holding that the buyer can be enjoined from participating in the contract in a proceeding brought under Section 3, it indicates that illegality attaches on the basis of the restraint which the contract imposes, and that such restraint may originate from a buyer's participation as well as a seller's. As indicated above, the holding of the court in *Tampa Electric* was recently reversed by the Supreme Court on the ground that the lower court had not used the proper relevant market in determining the probable competitive impact of the contract. The Supreme Court did not, however, overrule the opinion of the lower court that Section 3 was not limited to sellers, and may apply to a single contract of sufficient magnitude. It agreed that "a single contract between single traders may fall within the initial proscription of the section," but pointed out that the contract had to "work a substantial—not remote—lessening of competition in the relevant competitive market." 29 LW 4237, 4241.

31. The examiner finds it unnecessary to decide whether, under the language of Section 3 of the Clayton Act, making it illegal for "any person * * * to lease or make a sale or contract for sale" of the nature and with the competitive impact therein described, the buyer or lessee in the transaction can be joined as a party. The instant proceeding is brought under Section 5 of the Federal Trade Commission Act, which has been held to cover transactions involving the same types of restraint as those condemned by the Clayton Act, but which technically may not fall within that Act. See, for example, *FTC* v. *Motion Picture Advertising Service Co.*, *supra*, where the contracts did not involve a sale or lease of goods, but a service agreement, which is not technically covered by Section 3; see also *Report of Attorney General*, *supra*, at 148–149 and *Oppenheim*, *supra* at 28, to the effect that "the Commission is legitimately entitled to challenge under Section 5 conduct economically equivalent to the anticompetitive practices in Clayton Act provisions but not reachable thereunder due to lack of technical prerequisites" (*Oppenheim* at 28). Since the arrangements between Luria and the mills are of the type covered by Section 3 or are at least economically equivalent thereto, to the extent such arrangements have the proscribed effect the buyers may be held accountable under Section 5 of the Federal Trade Commission Act, even though their activities may not be reachable under Section 3 of the Clayton Act because of the technical wording thereof. There may be occasions where it would not be appropriate to join the buyers as parties, as where they were unwilling victims of the exclusive arrangements. Such considerations do not apply here, however, where the arrangements are the result of the mutual desires and interests of Luria and the mills.

32. Certain of the respondent mills have raised additional objections to their being held liable, viz, (a) that their arrangements with Luria do not cover their entire scrap requirements, and (b) that the proportion of the particular market foreclosed by their arrangements with Luria is too insubstantial to affect competition. Turning to the first of these objections, the evidence does disclose that while some of the mills have used Luria as their exclusive broker, they have not purchased all of their scrap from it since some of their requirements have been obtained from fabricators, railroads and other direct suppliers, as well as from a few local dealers. However, in each instance, as hereafter noted, Luria has supplied the bulk of the mill's requirements.

33. It has been admitted by Luria or the mills involved, or the evidence establishes, that Luria supplies substantially all of the requirements for purchased scrap of the following respondent mills: Baldwin-Lima-Hamilton (Standard Works Division plant at Burnham, Pennsylvania), Columbia Malleable Castings, Phoenix, Central, CF&I, Roebling, Granite City, Detroit Steel (Portsmouth, Ohio Division—supplied by Luria's subsidiary Southwest), Lukens, McLouth, Edgewater and Bucyrus-Erie (Raspberry Street plant at Erie, Pennsylvania). With respect to those mills or plants which use Luria as their exclusive broker, but which do not purchase substantially all of their scrap from it, the record establishes that they obtained the following percentages of their purchased scrap from it during the last two years covered by the evidence (the percentages being expressed both in terms of purchases from broker-dealer sources, and of purchases from all sources):

Percentage of purchases from Luria by certain mills (1953–54)

Mill	1953		1954	
	Percent broker-dealer scrap	Percent total scrap	Percent broker-dealer scrap	Percent total scrap
Bethlehem	81. 2	64. 0	80. 9	50. 9
Bethlehem Pacific	75. 4	66. 6	80. 4	72. 3
United States Steel (Geneva)	89. 5	77. 1	93. 9	61. 0
Weirton	70. 2	66. 5	69. 8	64. 1
Bucyrus-Erie (12th St.)	65. 0	65. 0	64. 5	64. 5

34. As will be noted from the table, most of the mills involved purchased approximately two-thirds of their scrap from Luria, except for Bethlehem which in 1954, following the issuance of the complaint herein, cut its purchases from Luria to approximately 51%. However, this continued to represent the great bulk of its purchases from